Office Supreme Court, U. S.
APR 14 1920
JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 1[redacted]44

JIN FUEY MOY, *Plaintiff in Error,*

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE D[redacted]TRICT COURT OF THE UNITED STATES FOR THE WEST[redacted]RN DISTRICT OF PENNSYLVANIA.

SUPPLEMENTAL BRIEF FOR THE PLAINTIFF IN ERROR.

McLANAHAN & BURTON,
H. RALPH BURTON,
Attorneys for Plaintiff in Error.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Statement of Facts	1
The Statute	4
Assignment of Errors	7
Argument	8
First Assignment of Error	9
Second Eleventh, Twelfth, Thirteenth and Fourteenth Assignments of Error	24
Third and Ninth Assignments of Error	29
Fourth Assignment of Error	34
Fifth and Seventh Assignments of Error	35
Sixth and Eighth Assignments of Error	39
Tenth Assignment of Error	40
Constitutionality	40
Conclusion	42

TABLE OF CASES CITED.

Burton vs. United States, 196 U. S., 283	27
Commonwealth vs. Packard, 71 Mass., 101	28, 40
Dukes vs. State, 11 Ind., 557	22, 40
Elliott vs. East Penn. R. R. Co., 99 U. S., 573	17
Francis vs. United States, 188 U. S., 375	16, 17
Iowa vs. McFarland, 110 U. S., 471	12
Meffert vs. Packer, 195 U. S., 625	41
People vs. Myers, 20 Cal., 76	18, 21
Schaffer vs. State, 8 Ohio St., 642	15
Sortwell *et al.*, vs. Hughes, 22 Fed. Cas., 13,177	15, 16
State vs. Haven, 59 Vt., 399	18
State vs. Judd, 221 Mo., 554	20, 28
State vs. Lockwood, 119 Mo., 463	18
State vs. Mahan, 2 Ala., 340	17
Stephens vs. State, 73 S. W., 1056	14
Tiffany vs. Nat'l Bank of Mo., 18 Wall., 409	17
United States vs. Doremus	41
United States vs. Dow, 25 Fed. Cas., No. 14,990	19

Page
United States vs. Friedman, 224 Fed., 276 ..15, 22, 28, 33
United States vs. Gossling, 12 Wheat, 460 17
United States vs. Harris, 171 U. S., 305 .....16, 17, 37
United States vs. Hess, 124 U. S., 483 40
United States vs. Howard, 3 Summer, 12 21
United States vs. Moy, 241 U. S., 394 .....38, 41
United States vs. Reynolds, 244 Fed., 991
17, 22, 23, 28, 32, 33
Williams vs. State, 107 Ga., 693 .....27, 40

TABLE OF REFERENCES.

Benjamin on Sales 12
Bishop's New Crim. Procedure 21
Blackstone's Commentaries 12
Bouvier's Law Dictionary 12
Century Dictionary and Cyclopedia 11, 13, 32
Comyn's Digest 21
Constitution of the United States 41
Standard Dictionary 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 161.

JIN FUEY MOY, *Plaintiff in Error*,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

SUPPLEMENTAL BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

The facts in this case are substantially set out in the original brief for the plaintiff in error, but this supplemental brief is filed for the purpose of bringing additional argument to the attention of this court and such facts as are

necessary to show upon what this argument is based, will be set out anew.

The plaintiff in error, defendant below, was indicted under section 2 of the Harrison Anti-Narcotic Act. The indictment (R. pp. 5-22) was in twenty (20) counts, all of which were identical except in the names of the persons, dates, and quantities in the prescriptions. One of these counts, which is typical of all, is set out in full in the original brief and charges:

> "* * * that Jin Fuey Moy, * * * was a practicing physician, and * * * did * * * sell, barter, exchange and give away derivatives and salts of opium * * * that is to say, that * * * he * * * did * * * sell, barter, exchange, give away, dispense and distribute to Dave G. Feigel * * * morphine sulphate, in manner following, to-wit, that said Jin Fuey Moy * * * did issue and dispense to said Feigel a certain prescription * * *" (Then follows the prescription.)

The plaintiff in error moved to quash the indictment (R. pp. 23-24) which motion was overruled (R. pp. 24-26). This is assigned as error on this writ (R. p. 173). Before verdict, the plaintiff in error filed a motion to strike from the record testimony of physicians as to the quantity of the drug prescribed, and charges for prescribing (R. pp. 160-161). This motion was also overruled (R. p. 161) and is covered by the ninth assignment of error (R. pp. 174-175); and an instruction to the jury on the same matter is covered by the third assignment (R. p. 173). Other errors assigned are to the court's instructions to the jury (R. pp. 173-174) and the court's overruling defendant's motion in arrest of judgment (R. p. 174), which motion and opinion are found on pages 166-171 of the record.

After the motion to quash the indictment was overruled, the case came up for hearing on the indictment and evidence

was submitted on both sides. The Government introduced witnesses who testified that the plaintiff in error had given them prescriptions for narcotic drugs; but they all testified that they purchased the drugs elsewhere, and all but one of them testified that plaintiff in error examined them before writing the prescriptions. Their testimony is found in the transcript of record on pages 55 to 115. The Government also put in evidence some prescriptions of the plaintiff in error, all of which had been filled by someone else (R. pp. 27, 39-42, 130-133). There was also testimony, for the Government, of a narcotic inspector who was with one of the other witnesses when he received a prescription (R. pp. 50-55); of a narcotic inspector as to the number of prescriptions written by plaintiff in error and filled by a certain druggist (R. pp. 116-125); of the Collector of Internal Revenue showing that plaintiff in error had registered as required by the Harrison Act (R. p. 130); and of physicians who testified to the standard of practice among physicians in prescribing narcotic drugs (R. pp. 28-50, 126-129, 133-137). The other witnesses were called on behalf of the defense.

None of the witnesses for the Government testified that they had bought the drugs from the plaintiff in error; that any had been bought from him; or that he owned any or had any in his possession. But all the evidence adduced showed that the drugs were bought from someone else. All the witnesses testified that the sales were consummated at a drug store and out of the presence of the plaintiff in error, and it was not contended by the Government that he was in any way interested in the store where the drugs were procured.

After all the evidence was in, and none of it tended to show any sale, barter, exchange, gift, dispensation, or distribution of drugs by plaintiff in error, the trial justice re-

fused to direct a verdict; and, after verdict, he would not arrest judgment, but passed sentence. These errors of the trial court are all pointed out and discussed in the argument, but let us first read the law under which the indictment was drawn.

THE STATUTE.

The indictment was brought under Section 2 of an Act of Congress, approved December 17, 1914, known as the Harrison Anti-Narcotic Act (38 Stats. L. 785; 6 Comp. Stats. 1916, Sec. 6287 G). This section of the Act was inadvertently omitted from the original brief and provides, in terms, as follows:

> "Sec. 2. That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. Every person who shall accept any such order, and in pursuance thereof shall sell, barter, exchange, or give away any of the aforesaid drugs, shall preserve such order for a period of two years in such a way as to be readily accessible to inspection by any officer, agent, or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officials named in section five of this Act. Every person who shall give an order as herein provided to any other person for any of the aforesaid drugs shall, at or before the time of giving such order, make or cause to be made a duplicate thereof on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue, and in case of the acceptance of such order, shall preserve such duplicate for said period of two years in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials hereinbefore mentioned. Nothing contained in this section shall apply—

"(a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this Act in the course of his professional practice only: *Provided*, That such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in this Act.

"(b) To the sale, dispensing, or distribution of any of the aforesaid drugs by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, or veterinary surgeon registered under this Act: *Provided, however*, That such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, or veterinary surgeon who shall have issued the same: *And provided further*, That such dealer shall preserve such prescription for a period of two years from the day on which such prescription is filled in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials hereinbefore mentioned.

"(c) To the sale, exportation, shipment or delivery of any of the aforesaid drugs by any person within the United States or any Territory or the District of Columbia or any of the insular possessions of the United States to any person in any foreign country, regulating their entry in accordance with such regulations for importation thereof into such foreign country as are prescribed by said country, such regulations to be promulgated from time to time by the Secretary of State of the United States.

"(d) To the sale, barter, exchange, or giving away of any of the aforesaid drugs to any officer of the United States Government or of any State, territorial,

district, county, or municipal or insular government lawfully engaged in making purchases thereof for the various departments of the Army and Navy, the Public Health Service, and for Government, State, territorial, district, county, or municipal or insular hospitals or prisons.

"The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall cause suitable forms to be prepared for the purposes above mentioned, and shall cause the same to be distributed to collectors of internal revenue for sale by them to those persons who shall have registered and paid the special tax as required by section one of this Act in their districts, respectively; and no collector shall sell any of such forms to any persons other than a person who has registered and paid the special tax as required by section one of this Act in his district. The price at which such forms shall be sold by said collectors shall be fixed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, but shall not exceed the sum of $1 per hundred. Every collector shall keep an account of the number of such forms sold by him, the names of the purchasers, and the number of such forms sold to each of such purchasers. Whenever any collector shall sell any of such forms, he shall cause the name of the purchaser thereof to be plainly written or stamped thereon before delivering the same; and no person other than such purchaser shall use any of said forms bearing the name of such purchaser for the purpose of procuring any of the aforesaid drugs, or furnish any of the forms bearing the name of such purchaser to any person with intent thereby to procure the shipment or delivery of any of the aforesaid drugs. It shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession.

"The provisions of this Act shall apply to the United States, the District of Columbia, the Territory of

Alaska, the Territory of Hawaii, the insular possessions of the United States, and the Canal Zone. In Porto Rico and the Philippine Islands the administration of this Act, the collection of the said special tax, and the issuance of the order forms specified in section two shall be performed by the appropriate internal revenue officers of those governments, and all revenues collected hereunder in Porto Rico and the Philippine Islands shall accrue intact to the general governments thereof, respectively. The courts of first instance in the Philippine Islands shall possess and exercise jurisdiction in all cases arising under this Act in said islands. The President is authorized and directed to issue such Executive orders as will carry into effect in the Canal Zone the intent and purpose of this Act by providing for the registration and the imposition of a special tax upon all persons in the Canal Zone who produce, import, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, or preparations."

ASSIGNMENT OF ERRORS.

The assignment of errors is set out in full in the original brief, pages 6-13, and is found on pages 172-177 of the transcript of record filed in this case.

The first error assigned had to do with the court's refusal to grant defendant's motion to quash the indictment (R. p. 173). The motion to quash (R. p. 23) questioned the constitutionality of the Act and the sufficiency of the indictment.

The second, eleventh, twelfth, thirteenth and fourteenth errors assigned (R. pp. 173, 177) had to do with the sufficiency of the indictment and the evidence.

The third and ninth assignments of error (R. pp. 173, 174) pertained to the court admitting in evidence certain testimony which was immaterial and irrelevant and which tended to unjustly prejudice the jury.

The fourth, fifth, sixth, seventh, and eighth assignments of error (R. pp. 173, 174) were to the court's instructions to the jury.

The tenth assignment (R. p. 175) was in the court's refusal to allow the wife of the defendant to testify.

These errors will be taken up in argument in the manner and order in which they are here grouped in order to avoid the consequent repetition and confusion of considering them separately.

ARGUMENT.

The three chief arguments against the judgment of the lower court are that section 2 of the Harrison Anti-Narcotic Act is unconstitutional; that the indictment, under which the plaintiff in error (defendant below) was convicted, was defective; and that there was not any evidence adduced at the trial which would warrant a conviction under the Harrison Act or any other law of Congress. The constitutionality of the Act has already been considered in detail in the original brief and, in this supplement, the sufficiency of the indictment and of the evidence and errors committed during the trial will be discussed.

At this point, let us outline briefly our contentions, after which they will be taken up under the several assignments of error; and, for this purpose, the Act will be *assumed* to be constitutional and valid.

The Act provides "that it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs," etc. The indictment charged that the defendant did sell, etc., by issuing prescriptions for drugs. Selling a drug and issuing a prescription for it are not the same thing. They are materially different and charges of both are contradictory. Being inconsistent, they are repugnant to each other; and this repugnancy makes the indictment defective, with the result that it should have been quashed.

The Act makes the sale unlawful but does not make any provision against the issuing of a prescription; so, if the charge of selling were alone and unexplained by the charge of issuing prescriptions, the indictment would be good as charging an offense under the statute. But, the repugnancy being present, it can only be disregarded by considering the explanation of the sales as immaterial and, therefore, surplusage. If it is considered as surplusage, it must be disregarded and the indictment stands with the single charge of selling; otherwise, it is repugnant and the whole indictment defective.

Before the trial court, there was not any evidence of a sale of the drug by the defendant, but all evidence adduced was of the issuing of prescriptions by him. If the charge of issuing prescriptions is disregarded as surplusage to save the indictment, the only one left is of selling, and there is a variance between this charge and the proof.

Whichever way the explanatory charge is considered, the conviction of the plaintiff in error fails. If it is considered as material, it is repugnant and fatal, with the result that the indictment is of no effect. If it is considered as immaterial and surplusage, it must be wholly disregarded, and there is a variance between the proof and the remaining charge of the indictment. Under either interpretation, the result is the same because there is nothing to support the conviction.

Now, let us consider these propositions more fully under the several assignments as grouped above.

FIRST ASSIGNMENT OF ERROR.

The first error assigned was that "the court erred in refusing to grant defendant's motion to quash the indictment, which motion was made before plea and before the jury was

sworn in the case" (R. p. 173). The grounds assigned by this motion were as follows (R. pp. 23, 24):

> "First. The so-called Harrison Act under which the indictment is found, is unconstitutional and void.
>
> "Second. It violates the tenth amendment of the Federal Constitution, as to the reserved rights of the State, as said Harrison Act is an attempt to regulate commerce wholly within a State, and to exercise police powers therein on the part of the United States.
>
> "Third. It violates said provisions in attempting to regulate the practice of medicine within the states.
>
> "Fourth. The indictment does not charge the defendant with the commission of any offense against the United States.
>
> "Fifth. The acts of the defendant averred in the indictment are not prohibited by law, nor are they in violation of any law of the United States.
>
> "Sixth. The indictment, as a whole, does not charge the defendant with the commission of any offense prohibited by the so-called Harrison Anti-Narcotic Act or with the commission of an offense prohibited by any other law of the United States."

The constitutionality of the statute was taken up in the original brief and the purpose of this argument is to show that the indictment was defective because it did not charge the defendant with any crime. Therefore, only the last three objections will be considered; and they will be taken up as one.

The indictment charged that defendant did sell, barter, exchange, and give away drugs by issuing prescriptions for them. It charged sales; but, after a videlicet and by way of explanation, it alleged that the sales complained of were merely the issuance of prescriptions. This explanatory clause shows with just what act it was intended to charge the defendant; but the acts made criminal by Section 2 of the Harrison Act were selling, bartering, exchanging, and

giving away narcotic drugs, and, unless the explanatory clause shows a sale, etc., it is an additional charge of a different act.

The acts prohibited by Section 2, under which the indictment was drawn, are selling, bartering, exchanging, or giving away drugs. To sell, to barter, to exchange, or to give away, have different meanings, but it is necessary to all of them that some property pass from one person to another. They are all in such common usage that it seems unnecessary to point out the definitions of the different dictionaries, but the following, taken from the Century Dictionary and Cyclopedia, are substantially the same as those employed by all the lexocographers:

> Sell: "To give up or make over to another for a consideration; transfer ownership or exclusive right of possession in (something) to another for an equivalent; dispose of for something else, especially for money."
>
> Barter: "To give for another of equivalent or supposed equivalent value."
>
> Exchange: "In common, to part with in return for some equivalent. To give and receive reciprocally."
>
> Give away: "To alienate (the title to or property of a thing); make over to another; transfer."

These definitions all show that it is essential that property in the thing sold, bartered, exchanged, or given away be transferred from one person to another. Since this transfer is necessary to all, it will only be necessary to consider one of the verbs because what is true of one, in this regard, is true of the others. For this purpose, let us take the first one—sell.

The statute provides that it is unlawful to sell narcotic drugs. Selling creates a sale. It is not until they are actually sold, that is, when there is a sale, that a criminal act has

been committed, for which a person can be prosecuted under the statute; and there is not a sale until property in the things sold passes from the seller to the buyer. This is very clearly brought out by the following excellent definitions of a sale:

> "A *transmutation of property* from one man to another, in consideration of some price." 2 Blackstone's Comm. 446.
>
> "A *transfer* of the absolute or general *property* in a thing for a price in money." Benjamin on Sales.
>
> "An agreement by which one of two contracting parties, called the seller, gives a thing and *passes the title* to it, in exchange for a certain price in current money, to the other party, who is called the buyer, or purchaser who, on his part, agrees to pay such price." Bouvier's Law Dictionary.
>
> "A *transfer* of property for a fixed price in money or its equivalent." *Iowa* vs. *McFarland*, 110 U. S. 471.

It is the sale for which a person is liable; it is the sale which is criminal; and these definitions show that an actual transfer of the property sold is necessary to its existence. They show that a sale implies a transferring of property from the seller to the buyer, or purchaser, and includes the vesting of the title in the purchaser as well as divesting the seller of it. Thus, a sale can be only to the party who, on the sale and by reason of it, becomes the *owner of the thing sold*.

The Act provides that a person is criminally liable for selling narcotic drugs, which means that he is liable for a sale of those drugs. It is a provision that it is unlawful to transfer drugs to another. We have considered selling only, but the same is true of bartering, exchanging, and giving away because, there also, there must be a transfer of the

property in the subject matter of the barter, exchange, or gift.

Now, the indictment charged that the defendant did sell, etc. Instead of allowing this allegation to stand so that it could be understood to mean that defendant had transferred the property in the drugs, it went on to state that the sales were, in fact, accomplished by issuing prescriptions for drugs and so the questions arise: Does issuing a prescription pass title to the thing prescribed? and, Is issuing a prescription, in reality, a sale, barter, exchange, or gift of the thing prescribed? If not, there are charges of two separate and distinct acts. If prescribing is not selling, bartering, exchanging, or giving away, the explanatory clause negatives them and contradicts the charge of them.

The Century Dictionary and Cyclopedia defines the verb, "to prescribe," as follows:

> "Specifically, to advise, appoint, or designate as a remedy for disease."

The same authority defines a prescription as follows:

> "In medicine, a statement, usually written, of the medicines or remedies to be used by a patient, and the manner of using them."

The Standard Dictionary says that, in medicine, a prescription is:

> "A physician's formula for compounding and administering a medicine."

These definitions will suffice to show that prescribing does not pass or transfer title to the thing prescribed, and that a prescription is merely advice, by which no property in the thing advised to be used passes.

If selling, bartering, exchanging, and giving away, drugs pass title to them and if issuing a prescription for drugs does not pass title to them, then the prescription is not a sale. The indictment alleges that defendant's prescribing was a sale; but, since they are different acts and prescribing is not a part of a sale, it could not be.

Let us consider it from another standpoint. A sale, barter, exchange, or gift, transfers the property and vests it in the purchaser, transferee, or donee. It gives him a vested right—a right *in rem*. A prescription does not vest the thing prescribed in the person to whom issued and he does not acquire a right *in rem*, nor even a right *in personam*, by virtue of it. He has not any rights whatsoever because of it, and to hold that issuing a prescription for drugs is a sale of them is a holding either that a sale does not transfer a vested right or that a prescription vests *the thing prescribed* in the person to whom issued.

A physician usually prescribes things which he does not have in his possession or any right in or title to, but a person can not sell that which is not his, or in his possession. He can not transfer property which is not his and vest it in another; therefore, since the things prescribed by physicians are not their property, they can not pass title to them and, as a consequence, no sale takes place. Prescribing is not selling, etc., and a sale, barter, exchange, or gift does not take place when a prescription is issued.

In *Stephens* vs. *State*, 73 S. W. (Tex. Cr. App.) 1056, it was held that issuing a prescription is not selling. In that case the defendant, a physician, was indicted for prescribing whiskey under a statute which made it unlawful to sell intoxicating liquors except on a prescription of a regular physician; and for a physician to issue a prescription for them except after a personal examination showing the applicant to be sick. The state constitution provided for leg-

islation prohibiting the sale of intoxicants. At the trial, it was not shown that any whiskey was sold because of the prescription.

It was held that, since the constitutional provision allowed only legislation against selling, the statute must be construed to comprehend only prescriptions upon which a sale is consummated because a prescription itself is not a sale. This is well brought out in the following extract from the opinion of the court:

> "The Legislature has no authority to punish a party for giving a prescription to himself. Hawk vs. State, 72 S. W. 842. No more could he be punished for giving a prescription to a third party. The Legislature has not been authorized by our Constitution to prohibit the giving of a prescription. *This is not a sale*, nor can it be tortured into a sale. It may be admitted that it contemplates the purchase of the intoxicant, but it is not a purchase or a sale."

It was also decided in *United States* vs. *Friedman*, 224 Fed. 276, that issuing a prescription for narcotic drugs is not selling, bartering, exchanging, or giving away, the drugs under Section 2 of the Harrison Act.

In *Schaffer* vs. *State*, 8 Ohio St. 642, the court said:

> "The administering of liquors as a medicine, to a patient by a physician could not properly be denominated a sale."

In *Sortwell et al.*, vs. *Hughes*, 22 Fed. Cas., No. 13,177, the plaintiffs were liquor dealers in Massachusetts and the defendant, who sold liquor in New Hampshire without a license, had bought from them, ordering in New Hampshire when one of the plaintiffs happened to be there; but the liquor was shipped by the plaintiffs from Massachusetts.

There was a New Hampshire law prohibiting sales of liquor in that state without a license. Plaintiffs sued the defendant in an action for goods sold and delivered and the defendant set up that the sales were illegal because of the New Hampshire law.

It was held that the defense was not good because the sales took place in Massachusetts and all there was in New Hampshire was a contract to sell. In this connection the court said:

> "But I can not construe a penal statute, which punishes a sale, so broadly, as to hold, that it applies to a mere executory contract of sale. In my judgment, it extends only to executed sales, by which *the property passes from the vendor to the vendee.*"

The rule of construction adopted in that case applies to the case under consideration. The Harrison Act is a penal statute and as such should receive a strict construction. *Francis* vs. *United States*, 188 U. S. 375; *United States* vs. *Harris*, 171 U. S. 305. It is a criminal statute in derogation of the common law and nothing should be added by intendment. Here, as in that case, the act complained of is not prohibited by the statute in express terms. In this case, the prescription might be instrumental in the consummation of a sale, but not any more so than the executory contract in *Sortwell* vs. *Hughes*. The doctrine of that case, that a criminal statute prohibiting selling can be applied only to actual sales where property is transferred, should have been adopted in the adjudication of this case.

It may be argued that it was the intention of Congress to prohibit prescribing as well as selling, etc., but this court has many times decided that nothing can be added to a criminal statute by intendment.

Francis vs. *United States*, *supra*.
United States vs. *Harris*, *supra*.
Elliott vs. *East Penn. Railroad Co.*, 99 U. S. 573.
Tiffany vs. *National Bank of Missouri*, 18 Wall. 409.
United States vs. *Gooding*, 12 Wheat. 460.
United States vs. *Reynolds*, 244 Fed. 991.

It was well known by those who drew up the indictment that the defendant could not be charged with a sale, etc., as provided against in the statute. It was also well known that a simple charge of issuing prescriptions would not be sufficient to sustain a conviction under the statute. But they very cleverly tried to meet the requirements of the statute by alleging that which could not be proved, and to meet the requirements of proof by alleging facts which might be shown. If the charge of a sale had been alone, the indictment would have been good; but it could not have been proved, and the defendant would not have been found guilty. If the charge of issuing prescriptions had been alone, the indictment would not have been sufficient as it would not have charged a crime under the statute. Then, how can a count be made good by the joinder of two charges which, in themselves, are not good? We contend that, in the absence of a statute making the two acts together one crime, this can not be done.

The allegations of prescribing and selling are inconsistent with one another and repugnant, which makes an indictment defective and it should be quashed. This is especially true where the repugnant allegations show a case not criminal. A case very much in point and very aptly stating the law is *State* vs. *Mahan*, 2 Ala. 340. In that case a state statute made it unlawful to bet on elections and Mahan was indicted for betting. An explanatory allegation (like the one of the indictment in the case *sub judice*) showed that the bet was on the result of an election already consummated. A

demurrer to the indictment was sustained on the ground that there was not any charge of an offense under the statute. The court laid down the following rule as basis for the decision:

> "In general, it is sufficient for the indictment to charge the offense in the terms of the statute, but if superfluous allegations are added, and these show a case not within the statute, the several allegations then become repugnant to each other, and the indictment is bad on demurrer. (King vs. Stevens et al., 5 East 244)."

The court said that the allegations were repugnant to the idea that the defendants were guilty under the statute.

In *State* vs. *Lockwood*, 119 Mo. 463, an indictment charged that the defendant wilfully and with culpable negligence killed another. It was held bad for repugnancy and quashed, the court saying:

> "If the killing was 'wilful' as charged in the indictment, then it could not have been accidental, or by 'culpable negligence.' The terms are inconsistent, as they can not both be true."

In *People* vs. *Myers*, 20 Cal. 76, it was held that a count in an indictment for arson alleging that the house burned was the property of one Lemon and the dwelling of one Chinaman, was repugnant and therefore defective.

In *State* vs. *Haven*, 59 Vt. 399, one count in the indictment charged that the defendant caused to be issued a false and fraudulent certificate of stock purporting ownership in stock, and of such tenor, and then went on to allege that the certificate was signed in blank. It was held that the allegations were repugnant and therefore the count was de-

fective, because a blank certificate can not purport ownership nor have a tenor as alleged.

Another count charged that the defendant signed a certain false and fraudulent certificate of stock with the intent that it should be issued and used, which certificate had been signed in blank and was issued. This was held bad for duplicity because signing was one act and issuing was another.

The case of *United States* vs. *Dow*, 25 Fed. Cas., No. 14,990, was on an indictment for murder. The first count alleged that the defendant "late of the District of Maryland, mariner, on the 31st day of October, 1839, then and there, being on board a certain brig called the Francis, belonging to a citizen of the United States, on the high seas, on the Atlantic Ocean, in latitude thirty-three" out of the jurisdiction of any particular state, and within the jurisdiction of the United States, did *then and there* commit the crime charged. There was a verdict of guilty and judgment was arrested. It was held that the words "then and there" must be taken to mean the 31st of October, 1839, in the District of Maryland as they are the only time and place mentioned and which could have been referred to; and, this being the case, it is repugnant to the allegation, in the same clause, that he committed the crime "out of the jurisdiction of any particular state." The following quotations from the opinion show the basis of the decision arresting the judgment, and the attitude of the court.

> "We have no jurisdiction unless the offense was committed out of the jurisdiction of any particular state. The allegations as to place are, therefore, both material; they are repugnant to one another; and, as neither can be rejected, the indictment is fatally defective."
>
> "The rules of law applicable to indictments, are un-

> doubtedly in many instances technical and nice; but they have been long and well established, and no court has a right to disregard them, even in the case of the humblest individual, or the most guilty offender."

In *State* vs. *Judd*, 221 Mo. 554, an information charged the defendant, Judd, with feloniously registering as a voter under a name not his own, to-wit, the name of Chas. Cohn, in violation of a state law, which he did by telling the election officers his name was Chas. Cohn and they entered his name as such at his request. It then went on to aver that defendant signed under the name of Chas. Cohn by writing on the books the name *Chas. Cohen*. It was held that the averments were repugnant as it is inconsistent to state that he signed one name after stating he bore another; and, since the demurrer was not sustained as it should have been, the objection, being a fatal one, was available on appeal.

These cases all show the effect of inconsistent and repugnant allegations in an indictment. They show that such repugnant averments as were in the indictment under which the plaintiff in error (defendant below) was prosecuted, make it defective and it should be quashed. If both averments are considered, the explanatory one contradicts the one explained and destroys the validity of the indictment. The only way in which one of them could be disregarded would be by considering it to be so immaterial as to amount to surplusage. In that case, the explanatory averment would have to be considered the surplus one because the other is the main charge and the only allegation of a crime under the statute. But not all surplusage can be disregarded.

Immaterial allegations which are not necessary to the charge may be rejected as surplusage; but, where they negative the charge, they can not be, and they are fatal to the count. This is a fundamental rule of our criminal law and

has been strictly adhered to both in England and America. The two following extracts from Comyn's Digest very aptly express the rule and show why the count is faulty:

> "An indictment is insufficient, whenever all the facts charged may be true, and yet the party be innocent." Indictment H.
>
> "Yet, if a man by the allegation of a thing not necessary shews that he had no cause of action, this, tho' surplusage, shall hurt." Pleader, c. 29.

It is also well stated by Mr. Justice Story in *United States* vs. *Howard*, 3 Sumner 12, as follows:

> "But no allegation, whether it be necessary or unnecessary, whether it be more or less particular, which is descriptive of the identity of that which is legally essential to the charge in the indictment can ever be rejected as surplusage."

The above extracts show that the early American authorities, as well as the English, considered an indictment defective where it showed that no prosecution was maintainable; and that an averment which negatives a good charge can not be rejected as surplusage. The same doctrine is in effect to day. It is stated, with supporting cases, in 2 Bishop's New Criminal Procedure, Sec. 482, as follows:

> "The doctrine is, that unnecessary matter, of a sort or so averred as to negative the offense meant, or otherwise to show the prosecution not maintainable, can not be rejected as surplusage."

In *People* vs. *Myers*, *supra*, it was urged at the trial that the repugnant allegation could be rejected as surplusage; but the upper court held that it could not, quoting the above extract from the opinion of Mr. Justice Story in *United States* vs. *Howard*, *supra*.

In *Dukes* vs. *State*, 11 Ind. 557, the defendant was indicted for murder and the second count charged that he did feloniously and unlawfully, without malice, kill and murder another voluntarily. This count was held bad as not charging any indictable homicide because it negatived the malice essential for first or second degree murder, and averred that it was done voluntarily which prevented it being manslaughter. In this regard, the court said:

> "It charges an act mentally, morally, and legally impossible to be performed by a 'person of sound mind,' viz., the voluntarily, without malice, in the absence of passion or excitement, and in no attempt to commit an unlawful act, unlawfully killing a human being."

These cases which are analogous to the case under consideration, illustrate the effect of an inconsistent allegation which negatives the principle charge and point out the result of an indictment showing that no criminal act has actually been committed. But it is not necessary to deal in analogies because the question raised here has been decided by the Federal courts in *United States* vs. *Friedman*, 224 Fed. 276, and *United States* vs. *Reynolds*, 224 Fed. 991.

In the *Friedman* case, the defendant was indicted under Section 2 of the Harrison Act for the same, or similar, acts as those which it was intended to prove against plaintiff in error. This is shown by the following statement of the facts by the court:

> "The indictment in this case charges the defendant with having dispensed, distributed, and prescribed gum opium and powdered opium, the derivatives, compounds, and preparations thereof, to-wit, morphine sulphate, heroin and cocaine, a derivative of coca leaves, without the dispensing, distribution and prescription as aforesaid being in the course of his professional practice; that is to say, that he dispensed, dis-

> tributed, and prescribed the aforesaid drugs in quantities more than those necessary to meet the immediate needs of a patient, and did not distribute, dispense, and prescribe the drugs in good faith and as a medicine."

The defendant demurred to the indictment and his demurrer was sustained because there was not a charge of a crime within the Harrison Anti-Narcotic Act. In sustaining the demurrer, the court said:

> "* * * he is indicted for giving a prescription for said drugs * * *.
>
> "I fail to find in the Act of Congress under examination any language making the doing of the things with which the defendant is charged a violation of law."

In the *Reynolds* case, the defendant, Reynolds, was indicted for dispensing opium in violation of Section 2 of the Harrison Act, by issuing prescriptions for it. The court held that this was not a criminal act within the terms of the statute. In regard to this, it was said:

> "The Harrison law requires nothing of physicians issuing prescriptions for opium save that they (be registered and sign and date the prescriptions). By giving a prescription, the physician does not 'dispense' opium, in the sense of the word as used in the said law. As defendant is not charged with having failed to so register or to so sign the prescription, he is not accused of any offense or violation of said law."
>
> "Defendant, charged with giving a prescription for and so dispensing pounds of opium, is not charged with any offense known to the law."

Those two Federal cases are identical with the case now under discussion and the same principle should apply in all. The averment that the sales were made by issuing prescriptions clearly shows that no offense under the statute was

actually committed, and the indictment should have been quashed; and, since it was not, the conviction should be set aside on this writ of error.

SECOND, ELEVENTH, TWELFTH, THIRTEENTH, AND FOURTEENTH ASSIGNMENTS OF ERROR.

These assignments have to do with the sufficiency of the indictment and the evidence introduced at the trial to sustain a conviction. There was not any evidence of a sale, etc., offered and, therefore, the court should have directed a verdict for the defendant. The second error assigned (R. p. 173) was that the court refused to instruct the jury as follows:

> "Under the law and the evidence the verdict must be not guilty in the case at No. 89 November Term, 1917."

The other errors assigned were as follows:

> "Eleventh. The learned Court erred in each and every particular of its general charge to the jury in this; to wit, That the Court should have withdrawn the issues from the jury and directed a verdict for the defendant." (R. p. 177.)

> "Twelfth. The learned Court erred in refusing to grant defendant's motion in arrest of judgment." (R. p. 177.)

> "Thirteenth. The learned Court erred in overruling motion made by defendant in arrest of judgment." (R. p. 177.)

> "Fourteenth. The learned Court erred in pronouncing judgment after motion made in arrest of judgment." (R. p. 177.)

The motion in arrest of judgment was made on the grounds that the Harrison Anti-Narcotic Act is unconstitutional; that the indictment does not charge the defendant with the commission of any offense prohibited by the Act; and that there was no competent evidence to sustain the verdict of the jury. (R. p. 166.)

The constitutionality of the Act was taken up in the original brief, and the insufficiency of the indictment was discussed under the first assignment of error; therefore, it will be necessary to consider only the evidence, under these assignments.

As already pointed out, the indictment charged two separate and distinct acts which are repugnant. If they are both allowed to stand on the ground that they are both material, the indictment is defective and would not sustain a conviction. The only way in which this inconsistency—repugnancy—can be disregarded is by considering the explanatory clause as surplusage; and, if this is done, it is the same as not in the indictment. If this court thinks that the allegation is so immaterial as to be surplusage, it must be rejected, and the indictment can be considered as only charging the defendant with selling, bartering, exchanging, and giving away the drugs.

Considering this as surplusage and stricken from the indictment, let us consider the evidence before the trial court and see if it was competent to sustain a conviction on the remaining charge of selling, etc. The evidence is all set out in the transcript of record, pages 26-165. There is testimony of five addicts to the effect that they procured prescriptions from the defendant; but they also testified that they did not receive the drug from him, but had to go to a drug store to get it. Their testimony is found on the following pages of the record: 55 to 80; 81 to 84; 85 to 107; 107 to 110; and 110 to 115. Their testimony is only that the defendant issued prescriptions for drugs. There was

also the testimony of a narcotic inspector that he was with one of the addicts when he procured a prescription from the defendant and bought the morphine prescribed at a drug store (R. pp. 50-55).

There was also testimony of a narcotic inspector who testified to defendant's prescriptions which had been filled at a drug store (R. pp. 26, 27 and 116-125); that of the Collector of Internal Revenue showing that defendant was registered as required by the Harrison Act (R. p. 130); that of physicians who testified for the Government concerning the treatment of drug addicts to effect a cure, and the standard of practice among physicians in prescribing drugs (R. pp. 28-50, 126-129, and 133-137); and various prescriptions for drugs issued by defendant were offered in evidence (R. pp. 39-42 and 130-133). This is all the evidence shown by the record as offered by the Government. There was not any evidence that defendant had any drugs in his possession at any time, that he sold any or gave any away, nor that anyone ever procured any from him. It all tended to prove only that he had issued prescriptions.

As already pointed out, issuing a prescription is not selling, bartering, exchanging or giving away that which is prescribed; therefore, the evidence, which tended to prove the former only, would not support a conviction on the latter. With only such as was put in evidence at the trial the defendant could not be convicted and the jury should have been so instructed; but they were instructed that, as a matter of law, the defendant would be liable for issuing prescriptions for drugs. See the sixth and eighth assignments of error (R. p. 171) hereinafter discussed in this brief.

The statute provides against selling, bartering, exchanging and giving away drugs and, if we consider the explanation of defendant's sale in the indictment as surplusage, the charge is that he did sell, etc. But the proof is at variance

with the charge as it is of a different act not related to a sale. Such a variance precludes a conviction, and, the jury finding a verdict of guilty, the court should have given judgment for the defendant *non obstante veredicto*, or defendant's motion in arrest of judgment should have been granted.

Where the indictment charges one act and the evidence proves another; that is, where there is a variance between the allegations and the proof, it is fatal. It is of the substance; and, as a matter of law, a conviction on the charge can not be sustained on the proof where there is such a variance between them. In such a case, the jury should be instructed to find the defendant not guilty; and, even after a verdict of guilty and notwithstanding it, the court should pronounce for the defendant or arrest judgment. This is well brought out in a number of cases of which the following are good examples.

In *Burton* vs. *United States*, 196 U. S. 283, the indictment charged that the defendant received money in St. Louis and the proof showed that a check was sent to Washington for him and taken by him to the Riggs Bank, which bank credited his account with the amount and forwarded the check to the St. Louis Bank on which it was drawn. It was held that such proof could not sustain a conviction on the indictment, the court saying:

> "The only liability of defendant was on his indorsement. All this made a payment at Washington, and as a result there was a total lack of evidence to sustain the sixth, seventh, eighth, and ninth counts of the indictment. The court should have, therefore, directed a verdict of not guilty on those counts."

In *Williams* vs. *State*, 107 Ga. 693, the defendant was indicted for selling liquor. One count charged a sale and another charged a contract to sell. At the trial, the evidence showed that he had been requested to get the liquor for

others who had given him the money to pay for it. It was held, on appeal from a conviction, that he was the agent of the purchasers and not a seller at all, and, therefore, the conviction could not stand as a verdict of guilty was contrary to the evidence.

In *Commonwealth* vs. *Packard*, 71 Mass. (5 Gray) 101, the defendant was indicted for selling liquor. The only witness for the prosecution was one man who had received a drink of brandy from the defendant, but he testified that the defendant would not accept any pay for it. The trial court refused to instruct the jury that there was no evidence to support a verdict of guilty; but, on appeal from a conviction, the judgment was reversed on the ground that there was no evidence which ought to have been left to the jury.

In *State* vs. *Judd*, *supra*, the information alleged that the defendant signed the registration book with the name Chas. Cohn and the witnesses for the prosecution negatived any signing of the name by the defendant. This was held a fatal variance between the allegation and proof and the conviction of the defendant was not allowed to stand.

In the case *sub judice* there is a similar variance between the charge and the proof. It has already been pointed out that the only evidence was of prescriptions, and such proof does not show a sale, barter, exchange, or gift. Nor does it show that drugs were dispensed or distributed. *United States* vs. *Friedman*, 224 Fed. 276; *United States* vs. *Reynolds*, 244 U. S. 991. (Dispensing and distributing are taken up in this brief under the next assignment.)

This variance is fatal and will not support a conviction. When the evidence was all in and it became apparent that no unlawful act under the statute had been proved, the court should have so informed the jury and directed a verdict for the defendant. The court refused to do this, and even went so far as to instruct the jury that, *as a matter of law*, the issuance of prescriptions for narcotic drugs by the

defendant would make him guilty under the indictment and the statute, and that they could so find (charges covered by the sixth and eighth assignments of error, R. p. 174). Even after verdict, the judgment should have been arrested, but the court refused defendant's motion and pronounced judgment on the verdict. This variance goes to the very substance of the action and, as a consequence, the judgment should be reversed on this writ of error.

THIRD AND NINTH ASSIGNMENTS OF ERROR.

The third assignment of error (R. p. 173) was to the court's instruction to the jury. The defendant requested the court to instruct the jury as follows:

> "Eleventh. The Act of Congress under which the indictments are drawn does not limit the amount of morphine sulphate which a physician may prescribe to his patient neither does said act limit the amount of money the physician may charge his patient for writing the prescription."

The court did so inform the jury, but instructed them that they might consider the amount prescribed and the charge therefor, in the following instruction:

> "The Act of Congress does not undertake to limit the morphine sulphate which a physician may prescribe for his patient, nor the amount of his charge therefor, but, if the physician seeks protection under Exception (a) as against the requirements of Section 2, it must appear that drugs were dispensed by him to a patient in the course of his professional practice only. And the amount of drugs so prescribed, and the charge therefor, may throw light on the question whether the drugs were in fact administered by the physician in good faith in the course of his professional practice only."

The ninth error assigned (R. pp. 174-175) was in the court refusing defendant's motion to strike from the record certain testimony of physicians and druggists (R. pp. 160, 161) concerning the amount of the drug prescribed by the defendant; the proper amount prescribed by a physician that a druggist would or should fill; the proper amount for a physician to prescribe; the proper charges of a physician for writing prescriptions and examining patients; and the proper charges of druggists for filling prescriptions. In overruling this motion to strike, the court said (R. p. 161), as ground for its action:

> "It being clear, under the provisions of the Harrison Anti-Narcotic Act, that none of the drugs in question may be imported, manufactured, sold, dealt in, distributed, or even given away, except for medicinal purposes, the motion to strike out is overruled."

Both of these assignments go to the admissibility of such evidence and the error of the court in allowing and instructing the jury to consider it.

None of this evidence is material or relevant as it does not tend to prove a sale or any other offense under the statute. The Harrison Act does not make any provision limiting the charge for a prescription or the amount prescribed.

Up until the time this testimony was offered, there had not been any evidence of a sale, bartering, or exchange and no evidence introduced which would make it relevant. Nor was there any evidence of a sale subsequently introduced. It not being evidence of a sale and no proof of a sale having been offered, it was immaterial. Until a sale was proved or evidence tending to prove one had been introduced, it was not competent; that is, it was not competent to try to show bad faith in the doing of an act which was not done.

The trial court, in refusing defendant's motion to strike out, very carefully avoided any reference to the relevancy of the testimony (R. p. 161). In its instruction to the jury, which was the occasion of the third assignment of error (R. p. 173), the court allowed the jury to consider it as tending to show bad faith in a sale which had not been proved. It was in fact, an instruction to consider the testimony as evidence of bad faith in the consummation of a non-existent act.

Such an instruction is clearly erroneous as the testimony can serve no other purpose than to prejudice the minds of the jury. In that instruction, the court said that the amount of drugs and the charge therefor "may throw light on the question whether the drugs were in fact administered by the physician in good faith in the course of his professional practice only." By it the court recognized the existence of that which was non-existent. It was the same as telling the jury to find that a sale had been made and that they could determine whether it was made bona fide or mala fide.

The defendant did not need to seek protection under Exception (a) as suggested by the court to the jury, because no sale, barter, exchange, or gift had been proved. That exception provides that the prohibition in Section 2 against selling, bartering, exchanging, or giving away drugs, shall not apply to "the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this Act in the course of his professional practice only." But it was not shown that defendant did dispense or distribute any of the drugs, and he did not need to defend on the ground that it was done in his professional practice only. The court tried to charge him with a defense which he had not undertaken and, by so doing, made it appear that he had admitted the dispensing and distribution of the drugs. The defendant denied that he had dispensed or distributed "any of the aforesaid

drugs," but the court took it for granted that he had and so instructed the jury.

The Century Dictionary and Cyclopedia defines the transitive verb "to dispense" as follows:

> "To deal or divide out; give forth diffusively, or in some general way; practice distribution of; as, the sun *dispenses* heat and light; to *dispense* charity, medicines, etc."

The same authority defines distribution as follows:

> "The act of dividing or parceling out; allotment in shares or according to requirement; apportionment; division among several."

These definitions will suffice to show that, in either, the thing dispensed or distributed passes from the dispensor or distributor to others. The exception to Section 2 of the Harrison Act provides that the prohibition shall not apply to "the dispensing or distribution of any of the aforesaid drugs," which means that it shall not apply where the drugs themselves are *dealt, divided, or parceled out.* Section 2 does not provide against writing prescriptions and this being an exception to that section, can not be construed to refer to prescribing, either.

In *United States* vs. *Reynolds*, 244 Fed. 991, the defendant, Reynolds, was indicted for giving a prescription for, and so dispensing, opium. It was the same charge as was made against plaintiff in error. The court held that there was not a charge of any offense known to the law because issuing a prescription for opium is not dispensing it, as meant by Exception (a) to Section 2 of the Harrison Act. In this connection, the court said:

> "The Harrison Law (Act of Dec. 17, 1914,) requires nothing of physicians issuing prescriptions for

> opium save that they, the physicians, be registered and the prescriptions be signed by the physician and dated as of the day of such signing. By giving a prescription, the physician does not 'dispense' opium, in the sense of the word as used in the said law. As therein used, 'dispense' relates to actual delivery of the drug by the physician to the patient, from the former's office supply, generally, though not excluding other actual delivery."

That decision stands for the proposition that prescribing is not dispensing or distributing. To the same effect is *United States* vs. *Friedman*, 224 Fed. 276.

Those cases also show that the Harrison Act can not be construed to limit the amount of drugs that a physician can prescribe. In the *Reynolds* case, the court said:

> "In said law is nothing prescribing quantities or forbidding prescriptions for the drug in any quantity. Any attempt to find it therein by construction or implication, does violence to that elementary principle that, when Legislatures undertake to create offenses, it must be by language clear and definite, making it obvious to ordinary intelligence that by certain conduct an offense, and the offense denounced by the statute, is committed. See U. S. vs. May, 241 U. S. 394; U. S. vs. Friedman (D. C.), 224 Fed. 276."

And in the *Friedman* case, the court interpreted the statute in the same way, saying:

> " * * * there is no limit fixed to the amount of said drugs that a physician may prescribe, nor is there any duty imposed upon him, other than to keep a record of all such drugs dispensed by him, and the name and address of the patient, except those to whom he may personally administer, and that he must preserve the records for a period of two years. For failing to do either of these things he is not indicted."

This being the law, the instruction requested, the refusal to grant which is assigned as the third error, should have been given to the jury; and they should never been told to consider the amount as was done in the instruction which was given instead of that request.

FOURTH ASSIGNMENT OF ERROR.

The fourth assignment of error (R. p. 173) was that the trial court refused to charge the jury that,

> "Before there can be a conviction of Jin Fuey Moy on the indictment at No. 89, November Term, 1917, the jury must find from the evidence, beyond a reasonable doubt, that said defendant, Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously, sell, barter, exchange, or give away some of the morphine sulphate to one or more of the persons named in said indictment."

Instead, the court did instruct the jury as follows:

> "While the indictment charged the sales and dispensing of the drugs were feloniously made, if the jury are satisfied beyond a reasonable doubt that they were wilfully and knowingly so bartered, exchanged or given away by the defendants, in violation of Section 2, as charged in the indictment, the defendants would be guilty."

The instruction requested shows that, for a conviction, the defendant must be found guilty of an offense made criminal by the Harrison Act; while the actual charge to the jury was that he could be found guilty of a crime if his acts were covered by the indictment. Acts are made unlawful by statutory law and not by indictments, and the fact that any act is charged in an indictment does not make it criminal so as to sustain a conviction if it is not criminal by common law or made so by statute.

The indictment charged that defendant sold drugs by issuing prescriptions for them and the court charged the jury that, if they were satisfied that they were "bartered, exchanged, or given away * * * as charged in the indictment," the defendant would be guilty. As already pointed out, the issuing of a prescription for drugs is not a selling, bartering, exchanging, or giving away of the drugs and is not made a crime against the United States; but, this instruction is a direction to the jury that it is a sale and leaving to them only the question of defendant's *bona fides*.

If the charge had been that they should determine whether or not there was a sale and how it was made, then it would be proper. But it was a charge that they could find him criminally liable for an act which was not criminal and the verdict of the jury, being upon such an instruction, must be considered erroneous.

FIFTH AND SEVENTH ASSIGNMENTS OF ERROR.

The fifth error assigned (R. p. 173) was that the court refused to charge the jury as follows:

> "If the jury find from the evidence that each of the prescriptions mentioned in the indictment at No. 89, November Term, 1917, were written by Dr. Jin Fuey Moy, in his office, on the several dates mentioned in said indictment, that the person for whom each prescription was written came to his office and stated that he was addicted to the use of the drug, giving the amount used, etc., and if before writing the prescription the doctor examined each patient after which he wrote the prescription with instructions as to how to use it, and believing that it would be used by the patient, then the offense charged in the indictment was not committed and the verdict must be not guilty."

The Harrison Act expressly provides that it is not to apply "to the dispensing or distribution of any of the aforesaid drugs to a patient by a physician * * * registered

under this Act in the course of his professional practice." The prayer merely requested the court to instruct the jury that, if they found that the defendant did issue the prescriptions mentioned in the indictment in the course of his professional practice, he would not be guilty under the Act. This was a proper instruction in view of the attitude of the court in overruling defendant's motion to strike out the testimony of the physicians and considering the issuing of a prescription as dispensing the drug, because the jury could not find a person guilty for an act which was not criminal and which a statute provided would not be criminal.

In place of granting the above prayer of defendant, the court instructed the jury as follows, which instruction was the seventh error assigned (R. p. 174):

> "You are to determine, gentlemen, from all the facts and circumstances, from the testimony of the Government and from that offered on the part of the defense, whether Dr. Moy dispensed narcotic drugs only to patients in the course of his professional practice, or whether he made a business of dispensing the drugs to the public generally as they were called for, merely seeking shelter behind the prescription which he issued. You have a right to consider the number of persons to whom he prescribed; whether they were known to him or were strangers; the character of the examinations, if any, which he made before prescribing; the number of prescriptions issued and the amounts prescribed to any individual at one time; whether he was endeavoring in good faith to treat them for the purpose of alleviating suffering or effecting a cure; or was making merchandise of narcotic drugs, feeding the depraved appetite of addicts without reference to their mental and physical welfare, or any ultimate cure to be effected."

That reads more like argument of the prosecuting attorney than an instruction to the jury. Could counsel argue to influence the jury more effectively than did the court when

he told them to determine if the defendant "was making merchandise of narcotic drugs, feeding the depraved appetite of addicts without reference to their mental and physical welfare?" Could such language do other than tend to prejudice the jury against the defendant? Is it consistent with the fundamental right of the accused to be presumed innocent until proved guilty? We contend that it is not and that it was prejudicial to the plaintiff in error.

The jury was told to determine "whether he made a business of dispensing the drugs * * * merely seeking shelter behind the prescription which he issued." This was a direction to them to find him guilty if, in their minds, a crime had been accomplished and an act of his, not wrongful in itself because not prohibited by any law, had, in some degree, been instrumental in its accomplishment. The Act does not provide against issuing prescriptions, but the court directed the jury to find the defendant guilty if they thought he did acts which had the bad effects that the statute was intended to prohibit. The court nor the jury can not go behind the statute and determine what was the intention of Congress in enacting it and decide that any person is guilty of an offense merely because they *think* that what he actually did do was to avoid the statute if the acts which he did were not prohibited and made criminal by the statute itself. It is a fundamental rule of law that criminal statutes are to be strictly construed; nothing is to be added to them by intendment. This was pointed out and authorities cited in the discussion of the first assignment of error. The principle of construction in this regard is very well stated in the opinion of this court in *United States* vs. *Harris*, 171 U. S. 305, in the following language:

> "It may be conceded that it was the intention of Congress to subject receivers of railroad companies, appointed such by courts of the United States, to the

> valid laws and regulations of the states and of the United States, whose object is to promote the safety, comfort, and convenience of the traveling public. But we are not now concerned with the general intention of Congress, but with its special intention, manifested in the enactments under which this suit is brought. * * * Can we fairly bring receivers within the penal clause by reasoning from a supposed or an apparent motive in Congress in passing the act?
>
> "Only by a strained and artificial construction, based chiefly upon a consideration of the mischief which the legislature sought to remedy, can receivers be brought within the terms of the law. But can such a kind of construction be resorted to in enforcing a penal statute? Giving all proper force to the contention of the counsel of the government, that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statutes, it still remains that the intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning. It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the class of persons who are subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute."

This opinion shows the law to be that the intention must be found in the language used. The Harrison Act (in the words of this court in *United States* vs. *Moy, supra*) "calls itself a registration and taxing act," and so must be considered as having been enacted for the purpose of raising revenue. Yet, the court instucted the jury that they could find the defendant guilty of selling if they believed he had merely issued prescriptions as a shelter, which instruction allowed them to find an intention to prohibit acts irrespective of their relation to the raising of revenue.

SIXTH AND EIGHTH ASSIGNMENTS OF ERROR.

The sixth and eighth assignments of error (R. p. 174) were to the general charge of the court to the jury as follows:

> "Now, I say to you, as a matter of law that a physician, under this Act, can not dispense any of these narcotic drugs except to a patient; that is, to one who is the subject of medical or surgical treatment; the drugs being dispensed to such patient by the physician for medicinal purposes, in alleviating suffering or endeavoring to effect a cure. *And a physician who prescribes such narcotic drugs* to one not a patient *violates the law.* Or, if he dispenses or distributes such drug in any way except in the course of his professional practice only, he is guilty of a violation of the Act in question."
>
> "*If you find that he was prescribing narcotic drugs* not in good faith and with an honest purpose to comply with the law, but was dispensed to the public generally as they were applied for, not in the course of his professional practice only, *then he would be guilty under this indictment.* He would not be entitled to the benefit of the exception under which he defends, because of his violation of its conditions, and would therefore be liable for a violation of Section 2, under which the indictment is drawn, of selling or dispensing such drugs without a written order from the purchaser, on order forms designated by the Act."

In both these instructions, the court said that the defendant would be guilty under the indictment, *as a matter of law*, if he prescribed for drugs in a given manner. It has already been pointed out that the Harrison Act does not provide against the issuing of prescriptions for drugs and that such prescribing is not a sale, bartering, dispensing, or exchange of, the drugs themselves. This being the case, it

is reversible error for the court to have so instructed the jury.

It is right for the court to interpret the law for the jury; but a verdict of the jury based upon an erroneous interpretation should be set aside, because it is without foundation. If the act of which the accused was found guilty was not a crime, a sentence upon the verdict should not be allowed to stand. Here the verdict was based upon the jury's understanding that, *as a matter of law*, the Harrison Act made it criminal for a physician to issue a prescription for narcotic drugs. This is a matter of substance and not form, and such matters are not cured by verdict. *United States* vs. *Hess*, 124 U. S. 483. A verdict can not stand, but will be set aside on appeal or writ of error, where it was based upon an erroneous understanding of the law and unsupported by the evidence. *Dukes* vs. *State, supra; Williams* vs. *State, supra; Commonwealth* vs. *Packard, supra.*

TENTH ASSIGNMENT OF ERROR.

This error (R. pp. 175-177) was in the court refusing to allow the wife of plaintiff in error to contradict the testimony of certain witnesses for the prosecution. They had testified to what transpired in her presence and she would be a competent witness to dispute them.

She was not offered as a witness on behalf of her husband; that is, to prove his innocence. Her testimony was merely offered for the purpose of showing the falseness of evidence offered by the Government. There seems no good reason for considering her incompetent for this purpose.

CONSTITUTIONALITY.

Now, let us consider briefly the constitutionality of Section 2 of the Act, not from the standpoint of the words

used, but in view of the construction put upon it by the trial court. The original brief considered it from the standpoint of the words used, *assuming* that plaintiff in error had sold some drugs instead of merely prescribing for them. Now, let us consider the constitutionality of that section as it was interpreted by the court.

The Harrison Act was enacted under the power delegated to Congress "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States." Constitution, Article 1, Section 8. The trial court held that Congress had authority to enact legislation prohibiting a physician duly registered by a state from writing a prescription within that state, and that the Harrison Act so provided. We have already shown that the Act did not provide against such and contend that no authority was delegated to Congress to so regulate the practice of physicians within the several states.

The Act is a revenue measure (*United States* vs. *Doremus*, 249 U. S. 86), but controlling the practice of physicians in making prescriptions is not even incidental to the collection of revenue. In *United States* vs. *Doremus*, decided March 3, 1919, this court said that the decisive question in determining the full power of Congress in enacting this law, is: "Have the provisions in question any relation to the raising of revenue?" In *United States* vs. *Doremus*, this court said that the ends in view in the enacting of this law must "be reached only through a revenue measure and within the limits of a revenue measure." Prescriptions do not interfere with the collection of the revenue and do not affect the thing taxed as they do not, in themselves, have any interest in, or transfer, the drug; and such legislation is merely the regulation of the practice of medicine, which is a state matter. *Moffett* vs. *Packer*, 193 U. S. [illegible].

It should be remembered in this connection that the act of selling narcotic drugs is made a felony by the statute, and plaintiff in error was indicted as a principal and not as an accessory (R. pp. 3-22).

CONCLUSION.

The indictment charged that the plaintiff in error sold by issuing prescriptions, thereby showing that there was no criminal liability. The evidence adduced at the trial only tended to show that he had issued prescriptions and nothing tended to prove that he had actually sold, bartered, exchanged, given away, dispensed, or distributed any of the drugs. There was no evidence which should properly have gone to the jury. And, aside from these objections, it is beyond the power of Congress to regulate the practice of medicine within the states and prohibit the writing of prescriptions by physicians and any Federal statute seeking to do so would be unconstitutional.

In view of these objections to the judgment of the trial court, it is respectfully submitted that the conviction be set aside and the indictment quashed.

McLANAHAN & BURTON,
H. RALPH BURTON,
Attorneys for Plaintiff in Error.

Office Supreme Court, U. S.
FILED
OCT 1 1920
JAMES D. MAHER,
CLERK.

No. 44.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

JIN FUEY MOY, PLAINTIFF IN ERROR,

v.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE UNITED STATES.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1920

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

JIN FUEY MOY, PLAINTIFF IN ERROR,
v.
THE UNITED STATES OF AMERICA. } No. 44.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE UNITED STATES.

The plaintiff in error was convicted in the District Court of violating the Harrison Antinarcotic Act (38 Stat., secs. III, c. 1, p. 785).

He was charged in 20 counts of the indictment with 20 unlawful sales of morphine. He was convicted on eight counts and sentenced to two years imprisonment and to pay a fine of $1,000.

STATUTE INVOLVED

The indictment was based on section 2 of the act, the pertinent parts of which are as follows:

> That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by

> the Commissioner of Internal Revenue. * * * Nothing contained in this section shall apply—
>
> (*a*) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this act in the course of his professional practice only: *Provided*, That such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend; * * *.

Other provisions of the act bring within this section the drug known as morphine sulphate and provide for the registering and licensing of physicians, dentists, or veterinary surgeons.

THE INDICTMENT.

All of the counts of the indictment are in exactly the same form, the only difference being in the quantity of the drug sold and the name of the person to whom sold. Taking the second count as an example, each count charges that on a certain day Jin Fuey Moy—

> was a practicing physician, and at the time and place aforesaid he, the said Jin Fuey Moy, did unlawfully, willfully, knowingly and feloniously sell, barter, exchange and give away derivatives and salts of opium, to wit, eight

drams of morphine sulphate, to one Joe Lewis, alias Henry McKnight, not in pursuance of a written order from the said Joe Lewis, alias Henry McKnight, on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, under the provisions of section 2 of an act of Congress approved December 17, 1914, and known as the Harrison Antinarcotic Act, that is to say, that at the time and place aforesaid, he, the said Jin Fuey Moy, did unlawfully, willfully, knowingly and feloniously sell, barter, exchange, give away, dispense and distribute to Joe Lewis, alias Henry McKnight, eight drams of morphine sulphate, in manner following, to wit, that the said Jin Fuey Moy, at the time and place aforesaid, did issue and dispense to the said Joe Lewis, alias Henry McKnight, a certain prescription, a copy of which is as follows: * * *.

The prescription is then copied and the count continues:

and the said Joe Lewis, alias Henry McKnight, was not then and there a patient of said Jin Fuey Moy, and the said morphine sulphate was dispensed and distributed by the said Jin Fuey Moy not in the course of his professional practice only contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America. (Rec., pp. 3–22).

It may be noted that the second and third counts charge sales to the same person—8 drams, or 480 grains, on March 25, and 12 drams, or 720 grains,

on the following April 28. (Rec., pp. 4–5.) Counts 4, 5, 6, and 7 all charge sales to one man—12 drams, or 720 grains, on March 30; 16 drams, or 960 grains on April 6; 16 drams, or 960 grains, on April 16, and 14 drams, or 840 grains, on May 8. (Rec., 6–9.) The tenth and eleventh counts charge sales to one man—16 drams, or 960 grains, on April 6, and 12 drams, or 720 grains, on April 27. (Rec., pp. 12–13.) These are the eight counts on which the plaintiff in error was convicted.

THE FACTS.

There is no serious controversy about the facts, and plaintiff in error did not take the stand to dispute them. He was a physician at Pittsburgh, and was duly registered under the Harrison Antinarcotic Act so as to be authorized to dispense or distribute morphine to a patient "in the course of his professional practice only"; that he issued indiscriminately prescriptions for morphine to all persons who desired them, regardless of whether they were his patients or not, is beyond doubt; that he was in this business was evidently well known, for people came to him from various places outside of Pittsburgh and outside of the State of Pennsylvania and obtained prescriptions. In some cases he went through the form of examining the eyes and making a superficial examination of the heart and lungs, but in other cases there was no pretense of an examination. His office was the resort of drug addicts and of those who desired morphine in large quantities. The

picture is by no means overdrawn by District Judge Thomson, in overruling a motion in arrest of judgment, when he said:

> The defendant seems to have obtained an extended and unenviable reputation as a dispenser of morphine sulphate. From Brooklyn to Chicago, from all the Lake cities, the victims of the drug habit came to Dr. Moy and procured the drugs. When we remember that the testimony showed that morphine sulphate is at least eight times as powerful and deadly as opium; that one-half grain is a large dose and a grain a fatal dose to the non-user; that there are sixty grains in one dram, and that the defendant time and again issued prescriptions for as much as sixteen drams to one person, or 960 grains, enough to kill an entire regiment; that he issued in the two years preceding the indictment, 11,687 prescriptions calling for 15,796 drams, and in addition 43,200 one-half grain morphine tablets and 30,600 one-quarter grain tablets, we can have some conception of the magnitude of the defendant's unlawful business in the distribution of narcotics. And when we consider that for every dram prescribed he received one dollar. the commercial feature of the unlawful business becomes painfully and alarmingly apparent. (Rec., pp. 170–171.)

All the prescriptions mentioned by Judge Thomson were filled at one drug store. Persons calling at that drug store for morphine were sent to Dr. Moy for a prescription. Persons to whom he gave pre-

scriptions were sent by him to that drug store. He made his prescriptions call for as large an amount as he dared. If the amount desired was, as he thought, too large, he gave two prescriptions to the same person, sometimes using two names, he himself suggesting the names and addresses to be used. His prescriptions were filled at the drug store without question, even when prescriptions in two names were presented at the same time by one man. His charges were not according to the usual practice of professional men, but according to the amount of the drug prescribed. He charged invariably $1 for each dram, or one-eighth of an ounce, prescribed. The facts as to the sales for which he was convicted are as follows:

Counts 2 and 3 were based on sales to Joe Lewis, alias Henry McKnight. Lewis lived in Toledo, Ohio, was a traveling man, and an addict to the morphine habit. On March 25, 1917, he went to the office of Dr. Moy, whom he had not previously known, and told him that he was an addict and wanted to be fixed up. Dr. Moy examined his eyes, tested his chest, and looked over his body, and wrote a prescription for 8 drams, or 480 grains, and said, "Make this do you three weeks or longer," and charged $8 for the prescription, which was immediately filled at the drug store named above. This prescription was issued in the name of Henry McKnight, 48 Sibley Street, Detroit, Mich. On the 28th of April, following, Lewis returned to the doctor's office. The

doctor asked him if he had been there before and, upon being told that he had, asked his name, and was told that it was Henry McKnight, 48 Sibley Street, Detroit, Mich. The doctor looked at his records and said: "You got eight bottles the 25th of March," and started to write a prescription for eight bottles. After some argument, in which the doctor started to say that he was using too much, he was given a prescription for 12 bottles, the doctor saying: "Make this last you 30 days or longer. You are using too much; I can't be giving you so much." The charge for this prescription was $12. (Rec., pp. 81–84.)

The fourth, fifth, sixth, and seventh counts charge sales to John Capello, alias Harry Lyman. Capello lived in Pittsburgh and went to the office of Dr. Moy, to whom he was unknown, on March 30, 1917, giving the name of Harry Lyman. He told the doctor he wanted to get some morphine. The doctor asked who sent him and he replied a friend from Cleveland. No examination whatever was made. Capello asked for 20 bottles, or drams, and was given a prescription for 12 and charged $12 and told to go to the drug store mentioned above, where the prescription was promptly filled. In asking for this prescription Capello said he wanted it for his wife, who was sick. He returned to the doctor's office on April 6, and asked for a prescription for 16 bottles, or drams. The doctor asked him where his wife was and was told she was sick, and gave him the prescription for the 16

bottles, which was filled at the same drug store. He returned on April 16 and asked for 16 bottles, or drams, and was given a prescription for that amount and charged $16, no examination being made and no questions asked. He came back on May 8 and got a prescription for 14 bottles or drams, without examination, questions, or instructions. All of these prescriptions were filled at the same drug store. On the last visit in April, Capello had asked for 24 bottles. The doctor said he could not let him have that much and the best he could do was to let him have 16 bottles. After some urging the doctor said he would see what he could do, and, after looking through his desk, wrote another prescription for eight drams in a name which the witness did not recall. The result was that Capello received one prescription for 16 drams in his own name and another for 8 drams in a fictitious name and was charged $24. He presented the two prescriptions at the drug store at the same time. Both were filled and the morphine delivered to him. (Rec., pp. 85–90.)

The remaining counts on which there were convictions are the tenth and eleventh, charging sales to John Henry. The two sales charged in these counts were on April 6 and April 27, but they are only two of a number of prescriptions issued to this man within a short time. Henry's real name was John A. Frew. He first went to Dr. Moy's office on March 14, 1917; gave the name of John Henry and said he lived in Cleveland, Ohio; was using about

8 grains of morphine a day and wanted a prescription for all he could get. The doctor looked at his eyes and at his arm, where he had been using morphine hypodermically, and wrote two prescriptions—one was in the name of John Henry for 10 drams and the other in the name of Helen Henry, which name he had given as that of his wife, for 6 drams. The John Henry prescription gave the address as 113 Smithfield Street, Pittsburgh. The doctor said he could not put this address on the wife's prescription because she was not in the city, and her address was accordingly given as 1562 Curtis Avenue, Cleveland, Ohio. Frew had stated that he was a stranger in the city and did not know any city address and was not stopping at any hotel. The doctor said: "Well, I will make this out 113 Smithfield, and that's a hotel, and say you stopped there last night." Upon being asked where the prescription could be filled the doctor referred to the drug store mentioned above. Frew suggested that he telephone the store and give directions, but the doctor replied: "Oh, never mind; we do business together; we understand each other." Sixteen dollars was charged for the two prescriptions; both were presented at the drug store at the same time and filled. The witness says he used some of it and gave some of it away. Shortly afterwards Frew returned to Pittsburgh, but Dr. Moy was away. He called at the drug store and was referred to another doctor, who gave him a prescription. On March 22 he returned and

obtained from Dr. Moy two other prescriptions, one in the name of John Henry for 7 drams and the other in the name of Helen Henry for 7 drams, and these were filled at the same drug store. On April 6 he returned and obtained from Dr. Moy two prescriptions for 8 drams each, one for Helen Henry and one for John Henry. The John Henry prescription gave a Pittsburgh address. Upon presenting these prescriptions at the drug store he was told that they would not fill any more under a Pittsburgh address; that they were taking too big a chance, and that he "must go back to the Chinaman and tell him" this. He returned to Dr. Moy and reported what had been told him at the drug store. The doctor then took the two prescriptions and instead wrote one for 16 drams with a Cleveland address. This is the sale charged in count 10. On April 27 he returned and received from Dr. Moy a prescription for 12 drams for John Henry, 1723 Curtis Avenue, Cleveland, Ohio. He presented this at the drug store, together with one written by Dr. Webber to John Craig, 9712 Jenny Lind Street, McKeesport, Pa., for 4 drams, and one by Dr. Trader to Frank Keith, 2223 Jenny Lind Street, McKeesport, Pa., for 4 drams, and all three were filled at the same time. (Rec., pp. 55–64.)

PROCEEDINGS IN THE COURT BELOW.

The defendant interposed a motion to quash the indictment, upon the grounds that the Harrison Anti-narcotic Act was unconstitutional, and that the indictment did not charge the defendant with the com-

mission of any offense against the United States. (Rec., pp. 23–24.) The motion was overruled. (Rec., pp. 24–26.) After the conviction there was a motion in arrest of judgment upon substantially the same grounds, and this was likewise overruled. (Rec., pp. 166–171.)

PRESENT CONTENTIONS OF THE PLAINTIFF IN ERROR.

In the original brief filed in this court plaintiff in error's right to a reversal is based alone upon the alleged unconstitutionality of the Harrison Antinarcotic Act.

In a supplemental brief filed later, however, it is insisted that the indictment does not charge an offense under the Harrison Act. The point made is that the indictment only charges the dispensing of a prescription, and that this does not constitute a barter or sale of morphine within the meaning of section 2 of the Harrison Act.

BRIEF.

I.

The Harrison Act is constitutional.

All of the objections now made to the constitutionality of section 2 of the Harrison Act were urged upon this court in the case of *United States* v. *Doremus*, 249 U. S. 86, and, after thorough consideration, the court held that section not subject to constitutional objections. This question is therefore foreclosed, and it is not deemed necessary to make any reply to the brief in so far as it challenges the constitutionality of the act upon which the indictment is based.

II.

The facts above set out constitute a violation of section 2 of the Harrison Act, for which the plaintiff in error may be prosecuted as a principal.

It is true that section 2 of the Harrison Act condemns the unauthorized sale, barter, exchange, or gift of morphine. It is insisted that the giving of a prescription upon which morphine may be obtained is not a sale, barter, exchange, or gift of the morphine itself, and therefore not within the terms of the act. The giving of a prescription, however, is one of the means by which the sale of drugs is ordinarily accomplished. The plaintiff in error was a physician, with authority to prescribe morphine, but his authority was expressly limited to dispensing or prescribing such drugs for "a patient" and only in the course of his professional practice. Obviously, he had no authority to give a prescription to anyone unless that one was, in fact, his patient, and not then unless the morphine was prescribed, in good faith, in the course of his professional practice—that is, for the purpose of effecting a cure or giving relief.

In this case it can not be insisted, for a moment, that any one of the persons to whom these prescriptions were issued was a patient of Dr. Moy. He had never seen any of them until they came to his office and asked for morphine. There was no pretense of any request that he should treat them. It was usually simply represented that they were addicts and wanted morphine. When he examined them at all it was most superficially and apparently

only to verify their statements that they were addicts. The amount that he prescribed was not determined by his own judgment as to what was necessary to effect a cure, but by what the applicant desired or, at most, was in the habit of using. He gave no instructions as to the use or directions for a gradual decrease in the amount to be taken. There is not a shadow of ground for saying that he exercised any professional supervision over any of these persons, or was in the slightest degree interested in whether they were cured or even desired to be cured of the habit. He simply provided a source from which all who desired could obtain as much morphine as they desired. The prescriptions which he gave, therefore, were clearly not within the protection of the exception to section 2, which has been quoted above. The sole question is whether, for the part he played in the transactions by which these persons obtained morphine, he was guilty of selling, bartering, exchanging, or giving away morphine. He did not, of course, give away any, for he collected $1 for each dram of morphine that he prescribed.

The provisions of the law with respect to selling drugs of this kind are very strict. In order to engage in any kind of unlawful sales, with any hope of getting by, it is necessary to adopt some form which will have the semblance of compliance with the statute. The most available means for this purpose will naturally be found to be the loose and reckless giving of prescriptions by physicians. Under this method the sale is accomplished by the act of the physician in

writing the prescription and the act of the druggist in filling it. There is no doubt in this case that, as the result of the thousands of prescriptions written by Dr. Moy and filled by the druggist, immense quantities of morphine have been sold to persons not entitled to buy it under the law. These sales were unlawful. They were accomplished by the action of the doctor and the druggist. It may be said that the doctor did not own any morphine to sell, but that all that was sold belonged to the druggist. The doctor's prescription, however, was just as effective to the accomplishment of the sale as the act of the druggist's clerk in filling the prescription and in delivering the drugs, and he had no more interest than the doctor in the morphine itself. The total amount which the customer paid was divided between the doctor and the druggist. For every dram sold at the drug store the doctor received $1 when he wrote the prescription. The sale of the morphine was, in fact, not made by the druggist alone, but by the druggist and the physician acting together. They both participated in the sale and also in the profits. No more skill or labor was involved in writing a prescription for 16 drams than for 1 dram, yet this doctor charged $16 for the one and $1 for the other. He was not, in fact, engaged professionally as a physician in writing prescriptions for patients, but was engaged, with the druggist, in making indiscriminate and unlawful sales of morphine. He not only based his charges on the amount of morphine prescribed, but gave prescriptions to a man for a wife whom he had never seen,

and who, in fact, did not exist. When necessary, he himself suggested fictitious names and addresses to be used on the prescription. Unlawful sales have undoubtedly been made. Dr. Moy participated in them, because without his prescription no druggist could furnish the morphine and hope to escape punishment. Whether it be said that he made these sales or merely aided and abetted the druggist in making them, he is equally guilty under section 2 of the Harrison Act.

Section 332 of the Criminal Code of the United States is as follows:

> Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

It can not be denied that Dr. Moy, by issuing his prescriptions, substantially aided and abetted the druggist in making these sales. It is certain that, through his prescriptions, he induced or procured the druggist to make the sales, and thus violated the law. It will be seen that the section of the Criminal Code above puts one who directly commits a criminal act in exactly the same category with one who procures the crime to be committed. No one can deny upon this record that Dr. Moy did procure unlawful sales of morphine to be made.

That such "prescriptions" as Dr. Moy issued were not prescriptions within the saving clause of section 2 was conclusively determined in *Webb* v. *United*

States, 249 U. S. 96. In that case the practice of the doctor in issuing prescriptions was identical with that of Dr. Moy in this case. The Circuit Court of Appeals certified to this court certain questions (p. 99), one of which was:

> 3. If a practicing and registered physician issues an order for morphine to an habitual user thereof, the order not being issued by him in the course of professional treatment in the attempted cure of the habit, but being issued for the purpose of providing the user with morphine sufficient to keep him comfortable by maintaining his customary use, is such order a physician's prescription under exception (b) of section 2?

In reply the court said:

> As to question three—to call such an order for the use of morphine a physician's prescription would be so plain a perversion of meaning that no discussion of the subject is required. That question should be answered in the negative.

In that case, the doctor and the physician were charged with a conspiracy to violate section 2. In this case the indictment, in connection with section 332 of the Criminal Code, charges the doctor with selling or, what is the same thing, aiding or procuring the druggist to sell morphine through the issuance of "prescriptions" which were not prescriptions within the meaning of the law.

III.

The indictment substantially charges the offense denounced by section 2 of the Harrison Act.

We have seen that the conduct of Dr. Moy made him clearly guilty of an offense under section 2 of the Harrison Act. It is insisted, however, that the indictment does not charge him with such an offense. The point made is that, taking each count of the indictment as a whole, it merely charges him with issuing prescriptions not in the course of his professional practice and to persons not his patients and that this alone is not made an offense under the act in question. It may be doubted whether the proposition is sound in any sense. Perhaps it may be said that the mere issuing of a prescription which is not filled would not support a conviction. But if a physician unlawfully issues a prescription and that prescription is filled, he has undoubtedly procured the crime denounced by the statute to be committed, and, as shown above, is guilty. In the indictment in this case it is specifically alleged that the plaintiff in error unlawfully, willfully, knowingly, and feloniously sold, bartered, exchanged, gave away, dispensed, and distributed morphine. His connection with such sale or barter is then stated by showing that he issued prescriptions. The necessary implication, of course, is that the prescriptions were filled. Otherwise, there would have been no sale of the morphine. A fair construction of the indictment then is a charge that the sales complained of

were made upon prescriptions issued by plaintiff in error. Under section 332 of the Criminal Code, above quoted, an indictment charging a defendant with making an unlawful sale may be supported by evidence showing that he aided or abetted or procured the sale to be made. It is not necessary in an indictment to distinguish between one who directly makes the sale and one who procures it to be made. Proof that either has been done will support the indictment.

It is conceded that if the indictment in this case had stopped with the charge that "Jin Fuey Moy did unlawfully, willfully, knowingly, and feloniously sell, barter, exchange, give away, dispense, and distribute to John Henry 16 drams of morphine sulphate" it would have been a good indictment. It is equally clear, from what has been said above, that a conviction on such an indictment would be properly supported by evidence that while, not making the sale himself, Dr. Moy had procured it to be made. In such a case, upon the trial, it would have been a good defense, of course, to show that while the doctor procured the morphine to be sold he did so by issuing a prescription in good faith to a patient whom he was treating. It would perhaps have been better practice to have left this question to be brought into the case as a matter of defense. But the draftsman of the indictment, in order to give the defendant specific notice of what he was charged with doing, and also to negative any possible claim that his act was within the exception to the statute,

added to the allegation above quoted, to wit, that the said Jin Fuey Moy, at the time and place aforesaid, did issue and dispense to the said John Henry a certain prescription, "a copy of which is as follows."

And following the copy of the prescription it was averred that John Henry was not a patient of Dr. Moy and the prescription was not given in the course of his professional practice. It is now said that the addition of these unnecessary averments destroys the indictment and leaves the plaintiff in error charged only with the single act of writing a prescription. The answer is that, as above shown, this very act, in conjunction with the sale and delivery of the morphine by the druggist, makes the physician guilty of a violation of section 2. The indictment, therefore, by way of surplusage, contains nothing more than a statement of the facts, which, if proven, without being averred in the indictment, would justify a conviction, and this is exactly what was proven on the trial.

The identical question was before the Circuit Court of Appeals for the Fourth Circuit in *Foreman* v. *United States*, 255 Fed. 621, 622. The indictment in that case charged that the defendant did—

> unlawfully and feloniously dispense, distribute, and sell to one Elsie Davis a certain quantity of a certain derivative of opium, to wit, 3 grains of morphine sulphate, he, the said Walter T. Foreman, then and there issuing to the said Elsie Davis a certain prescription wherein he, the said Walter T. Foreman, pre-

> scribed for the said Elsie Davis 3 grains of morphine sulphate—

and that the prescription was not issued in the course of professional practice only, or in pursuance of a written order on blanks issued by the Commissioner of Internal Revenue for that purpose. It will be seen that there is no substantial difference between this indictment and the one now under consideration. It was there objected that section 2 does not prohibit the dispensing and distributing but only the bartering, selling, etc., of morphine, and that hence the giving of a prescription was not a violation of the act. The court held, however, that the charge was properly made that the defendant had sold and that this charge was not negatived by the additional and, perhaps, unnecessary words "dispense" and "distribute," and said (p. 623.):

> But the charge in the indictment of selling without the order required is a charge of one of the precise acts denounced in the statute. The dependent clause "issuing to the said Elsie Davis a certain prescription and," etc., does not affect the matter, for proof of a sale without the order would be sufficient, even if made under the guise of a prescription. The defendant was therefore informed by the indictment that he was charged with selling to the persons named. Whether proof that the defendant had made a sale in some other way than under the guise of a physician's prescription would have been fatal variance between the charge and the proof is a question which does not affect the validity of the indictment.

So, in this case, the effect of an averment in an indictment of facts with respect to the prescription upon which the morphine was sold serves the purpose of identifying the particular transaction upon which the prosecution is based, and the only effect is to limit the charge to that transaction. If it had been attempted, under the general charge of unlawfully selling, to convict the plaintiff in error for another sale than that specified, there might have been a fatal variance. In the case just referred to, after holding the indictment good, the court reversed the judgment upon the ground that the evidence did not sustain the charge, saying (p. 624):

> The drugs were not furnished by the defendant. On the contrary, the prescriptions were carried by the recipients to different registered druggists and by them filled. There was no evidence that defendant was interested in the business of any of the druggists, or had any arrangement to share the profits of the sales with them, or that he was agent for any druggist, or that he even knew where the prescriptions were to be carried. What the statute forbids is sale, barter, exchange, or gift, including such distribution and dispensing by a physician not in the course of his practice as would amount to participation in a sale, barter, exchange, or gift. The mere issuance of a prescription by a physician to be filled by any druggist, without participation by the physician in the sale made under it, would not be a sale as charged in the indict-

> ment, or such distribution or dispensing as amounts to a sale.

It may well be doubted if this does not go further than the law requires. In view of the section of the Criminal Code quoted above, it is difficult to see how a physician unlawfully issuing a prescription for morphine, intending, of course, that it shall be filled by any druggist to whom it is presented, does not in every case participate in the sale which is actually made and thus becomes a direct offender under section 2. But the present case makes the plaintiff in error guilty under the rule above announced. His prescriptions were filled by the thousand at a particular drug store. He directed at least some of those to whom the prescriptions involved in this prosecution were given to that drug store. He stated that they did business together and understood each other. He charged so much per dram for the morphine prescribed and, in a most substantial sense, participated in the making of unlawful sales.

The question of the sufficiency of the indictment was well disposed of by Judge Thomson in overruling the motion to quash in this case as follows:

> As it was not necessary in this case for the pleader to negative the exception, is there anything in the subsequent words of the indictment that destroy the legal effect of the previous words wherein the charge is specifically and legally made? * * *.
>
> The offense under section 2 is to sell, barter, exchange, or give away any of the pre-

scribed drugs, except in pursuance of an order on the designated order form. The registered physician may successfully defend on the ground that he "did not dispense or distribute" the drug in question, except to a patient in the course of his professional practice only. But this is a defense which must be set up by the physician, in order to escape the general requirements prescribed in section 2. The words in which exception "a" are negatived in the indictment must be read in the light of the words in which the offense is charged under the general provisions of section 2. It is alleged under the videlicet that the defendant "did unlawfully, willfully, knowingly, and feloniously sell, barter, exchange, and give away," with the additional words "dispense and distribute," to Feigel the drug in question. This is followed by giving the manner of the disposition of the drugs by the issuing to Feigel of the prescription therein set forth. To this there can be but one meaning; that is, that the drugs were disposed of by means of the prescription. Then follow words which take the physician out of the exception, namely, that Feigel was not a patient of the physician, and the morphine sulphate was dispensed and distributed by the physician not in the course of his professional practice only. It can not be complained that the words "dispensed and distributed" are not used in the enacting clause of section 2. In order to escape the effect of the words "sell, barter, exchange, or give away" used in the enacting clause of section 2, the physician must show that the drugs so dis-

> posed of were dispensed or distributed by him to a patient in the course of his professional practice. (Record pp. 25–6.)

It is respectfully submitted that the facts averred in the indictment, if proven, would justify a conviction under section 2 of the act and that the indictment was therefore sufficient.

IV.

The entire record shows conclusively that plaintiff in error was guilty; the indictment gave him full and specific notice of the offenses with which he was charged; the objection now made to it is highly technical and does not affect the substantial rights of the party.

The act of February 26, 1919 (40 Stat., sess. III, c. 48, p. 1181), amending section 269 of the Judicial Code, provides that:

> On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.

If I am correct in the contention that the issuance and sale of these certificates makes the doctor issuing them guilty as a principal of the crime of unlawfully selling morphine, then an examination of the entire record can not leave the least possible doubt that Dr. Moy was guilty and should be convicted. The

present objection to the indictment and the defect in it, if any, are highly technical. It can not be claimed that Dr. Moy did not have full notice of the exact charge that was made against him and for which he was being tried. Indeed, the contention is that the indictment gave him fuller notice than was necessary, since it is conceded that it would have been a good indictment if it had omitted all reference to the prescription. He has, therefore, had a fair trial, with knowledge from the beginning of the precise complaint that was made against him. He does not dispute the facts and his guilt is beyond question. This is, in fact, exactly the kind of record upon which the statute quoted above forbids a reversal upon such technical ground.

V.

The assignments of error, complaining of rulings in the admission and exclusion of evidence and instructions to the jury given and refused, present no sufficient ground for reversal.

There are a number of assignments of error complaining of rulings made by the judge. Nearly all of these, however, in the last analysis, are based on the misconception that what Dr. Moy did was to issue prescriptions and that this could not, under any circumstances, render him guilty of a violation of section 2. Assuming that this construction of the law has been shown to be unsound, the rulings of the trial judge were entirely proper.

In the third assignment of error, error is assigned because, although at the request of the plaintiff in error, the trial judge instructed the jury that the statute does not limit the amount of morphine which a physician may prescribe, nor the amount of money which he may charge for his prescription, he added that the evidence touching these matters might be considered as throwing light on the question whether the drugs were, in fact, administered by the physician in good faith in the course of his professional practice only and to a patient. The ninth error complains of the admission of the evidence to which this instruction was applicable. Since the case turned, at last, on the point whether these prescriptions were given by a doctor in the course of his professional practice to a patient or merely for the purpose of selling or procuring the sale of morphine, this evidence was clearly competent and the instruction given proper.

The fourth assignment, in effect, complains because the court declined to instruct the jury that before they could convict it must be shown that Dr. Moy himself actually sold or gave the morphine, and that the giving of the prescription would not, in any event, make him guilty.

The fifth and seventh assignments complain because the trial judge refused to give an instruction to the effect that if Dr. Moy before writing the prescription examined each patient and gave instructions as to how to use the morphine, believing that it would be used by the patient, there could be no conviction,

and instead gave a modified instruction in line with what was said by this court in *Webb* v. *United States*, *supra*.

The sixth and eighth assignments merely complain of instructions which construed the statute as it is contended by the argument in this brief it should be construed.

The tenth assignment complains because the court refused to permit the wife of the plaintiff in error to testify as a witness for him. It is apparently conceded that if she had been offered as a witness to "prove his innocence" she would have been properly excluded as a witness. But it is said that her testimony as offered related only to a collateral matter; that she was offered to contradict the testimony of one of the witnesses that the doctor gave him a prescription in the name of his wife when his wife was not present at the office. No authority is cited to sustain this distinction, and it is believed none can be cited. If the wife is disqualified as a witness in a criminal case, she is disqualified without regard to the matters to which her testimony relates. Moreover, no substantial prejudice was done the plaintiff in error, even if this ruling was erroneous. The circumstances proven and not disputed would make him equally guilty whether she was absent or present when the prescription was given. Besides, this testimony related to only one or two of the counts in the indictment, while he was convicted on eight counts. The punishment imposed was not more

than the court could have properly imposed upon a conviction on one count.

CONCLUSION.

It is respectfully submitted that this is a correct and righteous judgment and that there is no sufficient ground for reversing it.

WILLIAM L. FRIERSON,
Solicitor General.

SEPTEMBER, 1920.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1920